

1 IN THE DISTRICT COURT OF GUAM

2 TERRITORY OF GUAM

3 * * *

4 **TYDINGCO**
5 **JUDGE OF THE DISTRICT COURT OF GUAM**

6 SEP 13 2007

7 **SEARCHED**
INDEXED

8
9 UNITED STATES OF AMERICA,) COURT OF APPEALS
10 Plaintiff,) CASE NO. 07-
11 vs.)
12 RYAN JASON WALL,) CASE NO. CR07-00001
13 Defendant.) CASE NO. CR07-00025
14 -----
15

16 TRANSCRIPT OF PROCEEDINGS

17 BEFORE

18 THE HONORABLE FRANCES TYDINGCO-GATEWOOD

19 Chief Judge

21 MOTION TO SUPPRESS

22 THURSDAY, MARCH 15, 2007

&

23 MONDAY, MARCH 19, 2007

&

24 TUESDAY, MARCH 20, 2007

25

DEFENDANT'S
EXHIBIT



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Official Court Reporter
District Court of Guam

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16

I N D E X

17	<u>Government Witness</u>	Direct	Cross	Redirect	Recross
18	Marvin R. Desamito	13	37		
19			75 (resumed)		
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22	Joseph A. Gange	139	153	163	170
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1 Drug Enforcement Administration task force office?

2 A. I've been with the DEA for about a year now.

3 THE COURT: Is that mike on?

4 (Pause to adjust the microphone.)

5 MS. SAN NICOLAS: All right.

6 Q. Agent Desamito, what are your working hours?

7 A. On my time sheet it says nine to five, but
8 it's -- could be nine to nine.

9 Q. All right. Agent, I'd like to call your
10 attention to a date, December 29, 2006; were you
11 working on that date?

12 A. Yes, ma'am.

13 Q. All right. Had you worked a full day?

14 A. Yes, ma'am, a full day.

15 Q. All right. Now, on that date, did you receive
16 a call from an anonymous person?

17 A. Yes, ma'am.

18 Q. All right. About what time did you receive
19 this call?

20 A. 6:00 p.m.

21 Q. What did that person say to you?

22 A. The caller asked me if -- she's known now --
23 or he's known now, he/she is known now as the SOI.

24 Q. Okay, so we'll refer to --

25 A. The source.

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1 Q. -- him or she as source of information?

2 He/she?

3 A. He/she.

4 THE COURT: That's national identi -- oh,
5 he/she.

6 THE WITNESS: That's what's on my affidavit.

7 THE COURT: All right, for purposes of
8 identification you put him or her, he/she, all right.

9 MS. SAN NICOLAS: Okay.

10 Q. Now, were you working that night at your DEA
11 office?

12 A. Yes, ma'am.

13 Q. All right. And where were you when you
14 received this call?

15 A. I was on my desk.

16 Q. All right.

17 THE COURT: I'm sorry, you were where?

18 A. On my area, my work area.

19 THE COURT: Okay.

20 MS. SAN NICOLAS: All right.

21 Q. So what did the SOI, the source of information
22 say to you?

23 A. The source indicated to me that there was a
24 DHL package on its way to Guam from Fife, Washington
25 that contained about five ounces of the drug ice.

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1 This is Agent Desamito's affidavit you're
2 proffering?

3 MS. SAN NICOLAS: Yes, Your Honor.

4 (Pause while defense counsel examines the
5 document.)

6 THE COURT: Gina, have it marked as an
7 exhibit. What do you call it, prosecution exhibit?

8 MS. SAN NICOLAS: Government's Exhibit 10,
9 Your Honor.

10 THE COURT: 10?

11 MS. SAN NICOLAS: Yes, Your Honor.

(Exhibit 10 was marked for identification.)

13 | BY MS. SAN NICOLAS:

14 Q. Agent Desamito, I've placed in front of you a
15 document which has been labeled Government's Exhibit
16 10; what is this document?

A. It's an affidavit.

18 Q. Now I asked you a question earlier, can you
19 tell me what was the DHL number that was given to you
20 on December 29, 2006?

The DHL number is 8329724874.

22 Q. All right. Now as that number was given to
23 you, you testified that you got on the DHL website?

24 A Yes ma'am

25 Q. And what was the result of looking on the

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1 website?

2 A. The outcome was the number yielded the package
3 left from Fife, Washington on the 15th, and enroute to
4 -- was at Los Angeles on the 27th.

5 Q. Okay, when you said 15th, what month?

6 A. I'm sorry, December 15th.

7 Q. All right. So the information that you
8 received from the source of information, you confirmed
9 it then?

10 A. Yes, ma'am.

11 Q. All right. Now, after you confirmed that
12 there actually was a package coming to Guam with this
13 specific DHL number, what did you do?

14 A. I contacted Task Force Officer Pete Ofeciar,
15 who is originally a Customs officer, I informed him
16 about the package, and informed the package to have a
17 lookout.

18 Q. And what's a lookout?

19 A. When packages come in from off-island, the
20 lookout is for, to basically hold the package or screen
21 it.

22 Q. Okay. Now, did you talk again or speak again
23 with this source of information?

24 A. Yes, I spoke to the source.

25 Q. All right. And approximately what date was

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1 THE WITNESS: Last name is spelled
2 O-F-E-C-I-A-R.

3 THE COURT: Okay. O-F-E-C-I-A-R, Ofeciar.
4 Thank you.

5 BY MS. SAN NICOLAS:

6 Q. Agent Desamito, all right, you met with the
7 source of information on December 29, 2006?

8 A. Yes, ma'am.

9 Q. What did the source of information tell you on
10 that date?

11 A. The source informed me that the package was
12 meant for a Ryan Wall, and it was to be arriving on
13 Guam.

14 Q. Okay. Did the source of information tell you
15 what the package contained?

16 A. Yes, ma'am, during the conversation the source
17 indicated that the package contained the drug ice.

18 Q. Did the source of information say that he or
19 she knew that this had happened prior?

20 A. Yes, ma'am.

21 Q. Previously? All right. Did the source of
22 information tell you an approximate date?

23 A. The source indicated December 6, 2006.

24 Q. Now, when the SOI was referring to that
25 December 6 package, what was inside that December 6

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1 meeting, Your Honor.

2 THE COURT: Only one. Okay.

3 MR. ARENS: That's not correct, Your Honor.

4 I'll show you the discovery, if the court's inclined,
5 to show there were more than one meeting with the
6 source.

7 THE COURT: Okay. Well, maybe we can get a
8 date on this face to face meeting and that clarify
9 everything.

10 Q. (BY MS. SAN NICOLAS:) Agent, you received a
11 tip, a telephonic tip. After that you met with -- face
12 to face with the source of information; is that right?

13 A. Yes, ma'am.

14 Q. All right. What information was given to you
15 that would led you -- lead you to believe that there
16 was probable cause to believe that evidence of the
17 crime can be found in that package?

18 In other words, what additional information
19 did you receive?

20 A. Besides the tracking number, the source
21 indicated that prior to the package that was coming
22 in, another package had arrived on Guam on December 6,
23 2007 (sic), which contained the drug ice. The source
24 also indicated Ryan Wall as the recipient of that
25 package.

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1 that they use?

2 A. Yes.

3 Q. One of the techniques, do drug importers use
4 the mail system for importation?

5 A. Yes, ma'am.

6 Q. And you informed the magistrate judge of this
7 in your affidavit; is that correct?

8 A. Yes.

9 Q. All right. Based on the information that you
10 had received, the tip on December 29, 2006, the face-
11 to-face meeting with the source of information on
12 December 29th, the fact that the DHL package actually
13 checked out, and based on the fact that --

14 MR. ARENS: Excuse me, Your Honor, objection.
15 Checked out with regard to what? Confirmed the
16 presence of contraband? Checked out the tracking
17 number?

18 MS. SAN NICOLAS: I'll restate it, Your Honor.

19 THE COURT: All right, restate.

20 MS. SAN NICOLAS: All right.

21 Q. Agent, could you tell the court what gave you
22 probable cause to believe that there would be drugs in
23 that package, what facts?

24 A. All the statements by the source regarding the
25 method, tracking number, points of origin, points of

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1 designation. And the actually the tracking number
2 itself.

3 Q. Was that garnered from the first telephonic
4 information that you received?

5 A. Yes, ma'am.

6 Q. Okay. Did you also take in consideration the
7 face-to-face meeting?

8 A. Yes, ma'am.

9 Q. What about the second, the face-to-face
10 meeting with the source of information, led you to
11 believe that there is probable cause to believe that
12 there is -- that the package may contain proof that
13 there was a crime had occurred?

14 A. I'm sorry, can you repeat it?

15 Q. What about the face-to-face meeting, what
16 information did you glean from the face-to-face meeting
17 with the source of information?

18 A. The identity of the suspect --

19 MR. ARENS: Excuse me, Your Honor, object.
20 Could the government please describe which meeting
21 she's referring to?

22 MS. SAN NICOLAS: The face-to-face meeting.

23 THE COURT: Was there only one meeting,
24 Ms. San Nicolas?

25 MS. SAN NICOLAS: There was -- there was one

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1 the court will sustain the objection. You're asking
2 who received it after him?

3 MR. ARENS: That's fine.

4 THE COURT: The court will sustain Ms. San
5 Nicolas's objection. He's clarified that on paragraph
6 16.

7 Okay, next question.

8 MR. ARENS: Thank you.

9 Q. Regarding the December 6, 2006 information you
10 received from the confidential informant, you were
11 impressed with the details she -- or that person had
12 given you, weren't you?

13 A. Yes, sir.

14 Q. And as a matter of fact, I believe you said
15 Thursday that it increased the level of probable cause
16 in your mind when you received such detailed
17 information; correct?

18 A. Yes, sir.

19 Q. Was there any doubt in your mind as to the
20 truth or falsity of that statement, that is, that a
21 package was received by Mr. Wall on the 6th of
22 December, 2006?

23 A. No, sir.

24 Q. Well, you knew Mr. Wall was in jail on the 6th
25 of December, 2006, didn't you?

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1 A. (No response.)

2 Q. I'll refer to the top of page 6 please, it's
3 paragraph 16.

4 A. Yes, sir.

5 Q. And that was a significant fact as far as you
6 were concerned, wasn't it?

7 A. It could not be corroborated.

8 Q. Did you think would have been important,
9 Officer Desamito, to either delete it or put in the
10 affidavit, that it couldn't be corroborated?

11 A. No, sir, I believe I had enough from just the
12 call itself, and from the DHL tracking number and all
13 the confirmations.

14 Q. But you tried to corroborate it, didn't you?

15 A. Ah, no, sir, because I didn't know where to
16 start from that.

17 Q. You just said it wasn't corroborated?

18 A. Yes, I didn't know how to corroborate that
19 portion, the information that the caller gave me as far
20 as the tracking number. I could have done -- I went to
21 the website, typed out the tracking number, and what
22 the caller gave me is what was on the website.

23 Q. You didn't even call DHL and say, did you have
24 a package come in on the 6th of December, 2006
25 addressed to Ryan Wall, did you?

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1 A. No, sir.

2 Q. Yet, according to you, the probable cause you
3 had was the reliability of this informant, wasn't it?

4 A. Yes, sir.

5 Q. The CI eventually told you his/her name,
6 didn't he/she?

7 A. Yes, the source did.

8 Q. You didn't run a police check on the source,
9 did you?

10 A. Yes, we did.

11 Q. Did you give that to the government?

12 A. Yes.

13 MR. ARENS: Your Honor, may we approach
14 please?

15 THE COURT: Okay.

16 (At side-bar.)

17 MR. ARENS: Did you give us anything to do
18 with her police check?

19 MS. SAN NICOLAS: I don't have anything on the
20 name of the CI, or SOI. I don't have anything on the
21 rap sheet request, I don't have anything like that
22 search my files.

23 MR. ARENS: Didn't he say he checked it?

24 MS. SAN NICOLAS: He said he checked the CI,
25 yes, he said he checked the background of the CI, but

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1 birth -- date of birth -- I'm sorry -- place of birth
2 and identification number, what happened next?

3 A. We, uh, we started prepping for the warrant.

4 Q. Okay. Now, did -- were other officers
5 involved in this?

6 A. Yes, ma'am.

7 Q. Okay. And so to clarify, you received the
8 tip, and you also met face to face with the source of
9 information?

10 A. Yes, ma'am.

11 Q. All right. And you also -- when the
12 information was verified with DHL, was that something
13 that you performed solely?

14 A. On the 29th, me and Task Force Officer Perkins
15 left the office about 12:00 a.m., we agreed to come
16 back the following day to continue our investigation.

17 The following day Task Force Officer Perkins
18 made a check of DHL with the tracking number; his check
19 yielded that the DHL package had arrived on Guam.

20 Q. Okay. Now, what information had you received
21 regarding a drug dog sniff?

22 A. While at my office I was preparing for the
23 warrant, Task Force Officer Perkins along with Customs
24 officers proceeded down to the DHL Tiyan to retrieve
25 the package.

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1 told -- what you just read to the court?

2 A. The information is accurate, sir. Task Force
3 Officer Perkins indicated to me that the drug detector
4 dog sniff was negative.

5 Q. You said there was one dog?

6 A. (No response.)

7 Q. Well, how many were there, one or two? If he
8 told you one, and this says two, which did you rely on?

9 A. Sir, he said the drug detector dog sniff, not
10 the drug detector dogs sniff.

11 Q. On examination you said one.

12 A. Yes, sir, dog singular.

13 Q. How many were there, officer?

14 A. According to Officer Perkins's report, there
15 were two dogs. When I got the information from Officer
16 Perkins, he indicated to me that the drug detector dog
17 sniff yielded negative results. I assumed there was
18 one dog because he said dog sniff.

19 Q. Is there anything else you assumed in this
20 document, officer, that we need to know about?

21 A. No.

22 Q. Since you didn't have personal knowledge of
23 this dog sniff, yet you wrote an affidavit describing
24 it?

25 A. (No response.)

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1 Q. And this information was presented to the
2 magistrate judge through your affidavit?

3 A. Yes, ma'am.

4 Q. And you personally appeared before the
5 magistrate?

6 A. Yes, ma'am.

7 Q. Agent, you testified -- you stated in the
8 affidavit before the magistrate that the dog sniff was
9 negative. Did that alter your belief that crime was
10 ongoing?

11 A. No.

12 Q. Why is that?

13 A. The drug sniff was only one measure that we
14 were going to use to gain more, more probable cause.

15 Q. In the training and experience that you've
16 detailed, do people involved in dealing drugs attempt
17 to conceal it?

18 A. Yes, ma'am.

19 MS. SAN NICOLAS: Your Honor, at this time
20 I have no further questions for this witness.

21 THE COURT: All right. Mr. Arens,
22 cross-examine.

23 MR. ARENS: Your Honor, do you think we'll
24 have time to do this before we break, that I can
25 complete this witness?

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1 THE COURT: You have a few more then?

2 MR. ARENS: Just reference paragraph 19 on
3 page 6, Government Exhibit A.

4 THE COURT: 10.

5 MR. ARENS: 10, beg your pardon.

6 THE COURT: All right, go ahead.

7 Q. (BY MR. ARENS:) The x-ray -- this is a quote
8 from you: The x-ray showed items that were suspicious
9 in nature and common with drug importation.

10 Is that your statement?

11 A. Yes.

12 Q. What specifically is suspicious about a
13 hairbrush?

14 A. This information was given to me from the
15 officers at the scene. It was from their knowledge
16 and experience.

17 Q. They didn't tell you that there was a
18 hairbrush in there, did they?

19 A. No.

20 Q. They didn't tell you all of the items that
21 were found in there, did they?

22 A. No.

23 Q. They didn't tell you there was a battery in
24 there, did they?

25 A. No.

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1 Q. They just said it's suspicious?

2 A. Suspicious in nature and common with drug
3 importation.

4 Q. You didn't ask them why it was suspicious in
5 nature and used common with drug importation, yet you
6 filed an affidavit and gave it to the magistrate under
7 oath; is that right?

8 A. Sir, at that time I trusted the training and
9 experience, the x-ray the Customs officer had.

10 Q. So when he says it's suspicious, you just, at
11 your typewriter: Package is suspicious, common with
12 drug trafficking. Is that right?

13 A. Yes, sir. He has more knowledge than me with
14 x-raying packages with suspicious material in it.

15 Q. All right. And, officer, is it your practice
16 to make a sworn statement subject to perjury without
17 confirming or following up on the information you put
18 in that affidavit?

19 A. (No response.)

20 Q. Is that your practice?

21 A. No.

22 Q. In preparing this affidavit, then, you broke
23 what is normally your practice, didn't you?

24 A. No.

25 Q. Officer, you didn't follow up and you didn't

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1 confirm the contents of your affidavit, did you?

2 A. Later on it was --

3 Q. Whoa, whoa! I'm talking about while you were
4 writing this affidavit.

5 A. The only people I could confirm with were the
6 people that were there.

7 Q. And so Perkins, if I understand you correctly,
8 walked into the office, you're at your typewriter,
9 because you, according to you, were writing this down
10 at your typewriter as it was coming to you, and he
11 said, gosh, we just x-rayed it and it looks suspicious,
12 and you didn't follow up on what was suspicious about
13 it before you wrote it in your sworn affidavit?

14 A. Officer Perkins informed me telephonically
15 that there was suspicious items inside the package.

16 Q. And at that, you wrote the report, without any
17 follow up?

18 A. Later on when Officer Perkins returned to our
19 office, he showed me the, the X-rays, and he explained
20 to me what the Customs officers deemed suspicious.

21 (Pause.)

22 MR. ARENS: Your Honor, I'm about to conclude,
23 Your Honor.

24 THE COURT: Okay.

25 Q. (BY MR. ARENS:) Did you agree with him that

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1 the specific question was, can you please tell us,
2 read, I think it was under cross-examination -- yeah,
3 can you read paragraph 19 -- was it 19?

4 MS. SAN NICOLAS: Your Honor, I believe that
5 was under cross-examination by Mr. Arens.

6 THE COURT: Right. And he did not read it.
7 So are you all speaking from the same affidavit? Do
8 you guys have the same one that I have?

9 MS. SAN NICOLAS: Apparently not, Your Honor.

10 MR. ARENS: I think it's apparent we don't
11 have the one that was submitted to the judge.

12 THE COURT: So that's not good.

13 MR. ARENS: That's not good at all.

14 THE COURT: That's terrible. That means that
15 you're not all talking from the same, you know --
16 because in the affidavit that was submitted to the
17 magistrate's judge, it specifically talks about why the
18 object was suspicious in nature. Now, I didn't bring
19 it up at all because I figured, well, you know, you
20 guys will get through that, through the testimony, I'll
21 let you all get through that.

22 But when Ms. San Nicolas submits to me on
23 March 16 this U. S. memorandum regarding suppression
24 hearing and attached is the affidavit that does not
25 have the most updated affidavit as far as I'm

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1 concerned, or as far as I know, without -- it's
2 submitted to me without all of the written amendments
3 in, I realized that she's got the wrong affidavit,
4 you've got the wrong affidavit, you're talking from the
5 wrong affidavit, or a different affidavit from what I
6 have in my court.

7 So, Mr. Arens, do you want to look at that?
8 Do you want to look at that right there? Look at page
9 6.

10 MR. ARENS: Could I get a copy of this?

11 THE COURT: No, it's coming. It's all coming.

12 MR. ARENS: I've never seen this.

13 THE COURT: You've never seen that? That's
14 not good.

15 MS. SAN NICOLAS: Your Honor, we would ask the
16 court for permission to -- well, obviously to review
17 the document, but then to elicit the questions, what
18 clarifications were made in chambers for the magistrate
19 judge by Officer Desamito.

20 THE COURT: Well, I mean, you're looking at
21 specifically on its face the written document. You all
22 have the wrong written document, do you agree with
23 that, Ms. San Nicolas?

24 MS. SAN NICOLAS: I agree, Your Honor, that
25 there are interlineations made, something --

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1 items were deemed suspicious because there was organic
2 material thought to be in the package?

3 A. Right after, sir, when Perkins returned to the
4 office and showed me the X-rays.

5 Q. And you made the determination that it was
6 suspicious based on the presence of organic matter;
7 isn't that correct?

8 A. No, sir. I, I made a determination from the
9 information I got from the Customs officers.

10 Q. What information is that, Officer Desamito?

11 A. That it was suspicious.

12 Q. Did you ask them what they meant by
13 suspicious?

14 A. Suspicious to contraband.

15 Q. They didn't tell you it had organic material
16 appearances when it went through the x-ray, did they?

17 A. No, they didn't.

18 Q. Perkins didn't tell you that, did he?

19 A. No, he didn't.

20 Q. And you didn't make that determination by
21 looking at the X-rays yourself, did you?

22 A. No, sir.

23 Q. And you didn't type organic material in your
24 affidavit, did you?

25 A. I would have to see the affidavit again.

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1 paragraph 19?

2 A. "CET determined the contents were organic in
3 nature and through their training and experience
4 consistent with contraband."

5 Q. Why did you write that under paragraph 19,
6 Officer Desamito?

7 A. Because Judge Manibusan wanted more
8 clarification as how I got to that.

9 Q. And you said, "Judge Manibusan, hand me that
10 document and I'll fill in the rest"; is that what you
11 did, Officer Desamito?

12 A. No, Judge Manibusan requested for me to write
13 in more detail as far as how I -- how I came to that
14 determination.

15 Q. Well, you never did come to the determination,
16 did you?

17 A. No, sir.

18 Q. Would it surprise you that the term "organic
19 material" is not contained in any of the discovery we
20 have found so far?

21 MS. SAN NICOLAS: Objection, Your Honor.

22 THE COURT: What's the objection?

23 MS. SAN NICOLAS: Your Honor, under a totality
24 of the circumstances analysis, the issue isn't what
25 happened subsequent to the issuance of the warrant.

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1 A. Yes, I do.

2 Q. As your own?

3 A. Yes.

4 Q. As the truth?

5 A. Yes, it is.

6 Q. With regard to the background check of
7 Mr. Wall, did you take the time to go to the Superior
8 Court and see the date of arrest, see whether a
9 judgment was entered, see which portion of the
10 proceedings the case was now at, or then at?

11 A. No, sir.

12 MR. ARENS: No further questions, Your Honor.

13 THE COURT: Okay. I need to -- you need to
14 clarify something, Agent Desamito.

15 THE WITNESS: Yes, ma'am.

16 THE COURT: Paragraph 19, I'm not clear on how
17 you got the information that you wrote in.

18 THE WITNESS: Which part, ma'am?

19 THE COURT: The writing under paragraph 19.

20 THE WITNESS: Oh, the -- the writing just
21 explains the second and third sentence. TFO Perkins
22 and CO3 Gange took the package to Customs Section at
23 the Guam International Airport and x-rayed the package.
24 The x-ray showed items that were suspicious in nature
25 and common with drug trafficking.

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1 Judge Manibusan wanted to know how the Customs
2 officer, okay, determined that the package was
3 suspicious in nature and common to drug trafficking.

4 THE COURT: All right. And I'm not sure you
5 clarified that for us earlier. Who gave you this
6 information?

7 THE WITNESS: That was TFO Perkins.

8 THE COURT: Perkins gave this to you?

9 THE WITNESS: Yes, ma'am.

10 THE COURT: Perkins told you that --
11 everything that you wrote here on paragraph 19, Perkins
12 told you that?

13 THE WITNESS: Yes, ma'am.

14 THE COURT: Quote: The CET determined the
15 contents were organic in nature, and through their
16 training and experience, consistent with contraband.

17 THE WITNESS: Yes, ma'am.

18 THE COURT: Okay. When you spoke to -- when
19 did you speak to him?

20 THE WITNESS: This was right after, we were
21 already at the office.

22 THE COURT: Right after where? I'm sorry,
23 give me the timing of this.

24 THE WITNESS: Right after they were checking
25 the package. They went to the airport to check the

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1 package, brought it back to the office.

2 THE COURT: Okay. I'm sorry, I recall you
3 saying that Perkins, Agent Perkins showed you the
4 X-rays?

5 THE WITNESS: Yes.

6 THE COURT: Was that at the same time?

7 THE WITNESS: Yes, that's at the same. That's
8 where the word organic came from.

9 THE COURT: Okay. Then tell me what happened.

10 THE WITNESS: Well, TFO Perkins explained to
11 me what was explained to him by the Customs officers.

12 THE COURT: Because he was there.

13 THE WITNESS: Because he was there, that this,
14 that the portion of the x-ray showed an organic matter.
15 I was like, you know, what's that? He was like, that's
16 what the Customs officers informed him.

17 THE COURT: Okay. And so, and he, Agent
18 Perkins told you that, and you placed that on this page
19 6?

20 THE WITNESS: Yes, for clarification, upon
21 the -- you know, upon when Judge Manibusan questioned
22 me about it.

23 THE COURT: Judge Manibusan was trying to find
24 out what you meant by suspicious in nature.

25 THE WITNESS: On what -- he wanted to know

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1 THE WITNESS: Yes, ma'am.

2 THE COURT: Go ahead.

3 MR. ARENS: I have a followup based on the
4 court's questions if I may, Your Honor?

5 THE COURT: You may.

6 FURTHER RECROSS-EXAMINATION

7 BY MR. ARENS:

8 Q. According to your earlier testimony, while you
9 had direct contact with Agent Perkins, you were at your
10 typewriter typing in what people were saying; isn't
11 that right?

12 A. Yes, sir.

13 Q. Well, you didn't write organic matter in the
14 affidavit, did you?

15 A. The organic matter came after, sir, when Agent
16 Perkins arrived.

17 Q. And you didn't have time to go in and insert
18 that prior to showing it to the magistrate judge; is
19 that what you're telling the court?

20 A. Sir, at that time I didn't think it was
21 necessary.

22 THE COURT: Okay, I'm sorry, do you want to
23 clarify the timing on this?

24 MR. ARENS: Apparently, Your Honor -- correct
25 me if I'm wrong, Officer Desamito -- typing it down

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1 Q. He said he told you there was an organic
2 product in there, didn't he?

3 A. Yes, sir, we discussed that.

4 Q. And that's not in your report either, is it?

5 A. No, sir, it's not.

6 Q. It's not in the affidavit of probable cause,
7 is it?

8 A. As it was signed, yes, it was, sir.

9 Q. Before it was taken into the office, it wasn't
10 in that report, was it?

11 A. No, sir, it was not.

12 Q. These findings about turning the package
13 upside down, he told you what that led him to believe,
14 didn't he?

15 A. Yes, sir, I was standing right next to him as
16 -- through the whole process.

17 Q. And that wasn't in your report either, was it?

18 A. No, sir.

19 Q. He told you the way it was packaged was
20 suspicious, didn't he?

21 A. Yes, sir, he did.

22 Q. And that wasn't in your report?

23 A. No, sir, it culminated to the suspicious in
24 nature, and that was in my report.

25 Q. Items suspicious in nature and common in drug

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1 again, Ms. San Nicolas? What's your last question?

2 MS. SAN NICOLAS: The question, Your Honor,
3 was, what was suspicious about the x-ray. His response
4 was that it appears to be -- he didn't complete the
5 answer, but it appears he was going to state what was
6 suspicious about it.

7 THE COURT: Just the x-ray itself, right?

8 MS. SAN NICOLAS: Well, he also testified that
9 it was also the DEA intel that he had received.

10 THE COURT: I know, but the question that was
11 focusing on the x-ray right now, is that where you're
12 going?

13 MS. SAN NICOLAS: Yes.

14 THE COURT: All right. The objection will be
15 overruled. You may answer the question regarding the
16 x-ray.

17 Restate the question?

18 Q. (MS. SAN NICOLAS:) Why did you believe there
19 were illegal narcotics in that package?

20 A. Like I was saying earlier, it was based on my
21 experience with looking at these types of X-rays.

22 Q. This information that you had after you
23 x-rayed it, did you convey that to the DEA task force
24 agents?

25 A. To Officer Perkins, yes, consistent with --

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30

1 saying it was consistent with possible contraband.

2 Q. At that point, you could have opened the
3 package?

4 A. Yes, I could have.

5 Q. As a Customs officer, is that right?

6 A. Yes, ma'am.

7 Q. As a Customs -- as a contraband enforcement
8 officer, someone who is on a contraband enforcement
9 team, what are the things you look for that are
10 suspicious based on your training?

11 A. Well, where it's being sent from, the items
12 itself, the way they package it, these are some of the
13 things that we look at.

14 Q. Are you familiar with attempts to conceal?

15 A. Yes. With some of the classes that they do
16 give us, like on-the-job training also, they actually
17 do try to hide things and ask the officer to pinpoint
18 what it is, what the commodity may be.

19 Q. So you have a lot of -- you have on-the-job
20 training as well?

21 A. Yes, I also have on-the-job training.

22 Q. How often do you have packages that are
23 unmanifested?

24 A. It's on a daily basis, because some shipments
25 will arrive with certain freight forwarders, some get

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1 Q. That's the first time in your report there's
2 mention of suspected crystal methamphetamine, isn't it?

3 A. It's actually a field test positive, sir.

4 Q. That is the first time in your report you
5 mentioned crystal methamphetamine, isn't it?

6 A. Yes, sir.

7 Q. No reference to organic material in your
8 report, is there?

9 A. That was discussed with the case agent for
10 DEA, Mike Perkins.

11 Q. My question, Officer Gange, is there is no
12 reference --

13 A. No, sir.

14 THE COURT: I'm sorry, what was no reference
15 to what?

16 MR. ARENS: To a crystal-like substance
17 anywhere in his report prior to the execution of the
18 warrant upon the package. No mention of organic
19 compound in the report.

20 Q. As a matter of fact, the suspicious nature of
21 the way it was packaged isn't in your report either, is
22 it?

23 A. No, sir.

24 Q. As a matter of fact, the list on the outside
25 compared with the items in the inside, which you deem

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1 But the actual, the actual x-ray when you look at it,
2 you could actually see what you're looking at.

3 THE COURT: So this just shows the same
4 similar stuff you indicated earlier.

5 Okay, thank you, officer.

6 Do you have any questions, you guys, while
7 he's here on these exhibits?

8 MR. ARENS: I just have a couple of followup,
9 but I can wait until you're done, Your Honor.

10 THE COURT: Okay. Let me just ask you --
11 looking at my notes here.

12 So what exactly did you tell, just for
13 clarification, what exactly did you tell officer, Agent
14 Gange, regarding your x-ray --

15 THE WITNESS: Officer Perkins, you mean?

16 THE COURT: I'm sorry, Perkins. You're
17 Officer Gange, excuse me, I apologize.

18 THE WITNESS: That it possibly contained
19 illicit narcotics based on my experience, and also the
20 way it was packaged.

21 THE COURT: And you could, you could tell when
22 you moved it -- when you X-rayed the package you
23 indicated it appears like everything was glued
24 together?

25 THE WITNESS: Well, when we turned it upside

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District Court of Guam

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R. Desamito
MAR 23 2007

6 DISTRICT COURT OF GUAM
7 TERRITORY OF GUAM

8
9 UNITED STATES OF AMERICA,
10 Plaintiff,
11 vs.
12 RYAN JASON WALL,
13 Defendant.

Criminal Case No. 07-00001

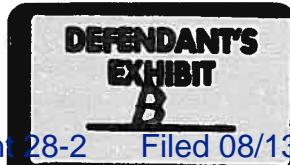
**ORDER RE: MOTION TO SUPPRESS
EVIDENCE AND STATEMENTS**

14
15 The Defendant's Motion to Suppress came before this Court for an evidentiary hearing
16 on March 19 and March 20, 2007. After hearing the testimony of witnesses and argument from
17 counsel, the court **DENIED** the Defendant's motion. For the reasons discussed herein, the court
18 sets forth more fully the reasons for **DENYING** the motion.

19 **I. FACTS**

20 On December 29, 2006, at approximately 6:00 p.m., DEA Task Force Officer Marvin R.
21 Desamito ("Officer Desamito") received an anonymous telephone call regarding a DHL package
22 containing crystal methamphetamine ("ice"). The caller ("informant") provided Officer
23 Desamito with DHL Tracking Number 8329724874 and told the officer that on December 15,
24 2006, the package had been sent from Fife, Washington. While he was on the phone with the
25 informant, Officer Desamito verified the package number with the DHL Website. He
26 subsequently placed a "lookout" for the DHL package with Guam Customs and Quarantine
27 Agency.

28 On that same date, Officer Desamito and Officer Michael C. Perkins ("Officers") met



1 with the informant in Hagåtña, Guam. The informant told the Officers that the package had been
2 sent to the Defendant, Ryan Jason Wall (“Defendant”). In addition, the informant told the
3 Officers that the Defendant had previously received a DHL package which had contained “ice”
4 that had been concealed in the package.

5 Thereafter, Officer Desamito conducted a criminal history check of the Defendant and
6 learned that he was currently on probation on Guam for charges of Assault and Family Violence,
7 Failure to Appear, Violation of a Court Order, and Assault. Additionally, an arrest warrant had
8 been issued for Mr. Wall in Tacoma, Washington.

9 On December 30, 2006, Officer Perkins learned that the DHL package had arrived on
10 Guam at 8:00 a.m. A cursory sniff of the package was made by Guam Customs and Quarantine
11 Drug Detector Dogs with negative results. The package was also X-rayed at the Guam
12 International Airport Authority (“GIAA”) and the contents were noted to contain an organic
13 substance consistent with illegal contraband. The package was secured in the Customs
14 Enforcement Team vault at the GIAA. The Officers then requested for and obtained a search
15 warrant from the magistrate judge on December 31, 2006.

16 On December 31, 2006, the search warrant was executed and the DHL package was
17 opened at the Guam Resident Office. The DHL package was identified as 8329724874. *See*
18 Opposition, Exhibit 1 attached thereto. The contents were field tested with the Marquis Reagent
19 Kit and tested positive for methamphetamine. *See* Opposition, Exhibits 6 and 7. The packages
20 contained 118.9 gross grams of crystal methamphetamine. *See* Opposition, Exhibits 8 and 9.

21 The methamphetamine was replaced with a “sham” product and placed back into the mail
22 delivery system. The Defendant drove to the DHL Office, entered the building and provided the
23 tracking number and received the package. As he was leaving the building, he was arrested.
24 The Defendant now seeks the suppression of all the physical evidence and the fruits thereof,
25 along with any other physical evidence and statements, derived from the search of the DHL
26 package executed on December 31, 2006.

27 **II. DISCUSSION**

28 Defendant specifically argues that the evidence seized from the Defendant should be

1 suppressed because there was no probable cause supporting the warrant. The Fourth Amendment
2 restraints the government from performing “unreasonable searches and seizures.” U.S. CONST.
3 amend. IV. The touchstone in evaluating the permissibility of any search is “reasonableness.”
4 *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). In most cases,
5 reasonableness requires a warrant and probable cause, supported by Oath or affirmation. *Id.* It is
6 unnecessary that the evidence establishing probable cause reflect the direct personal observations
7 of a law enforcement official. *United States v. Ventresca*, 380 U.S. 102, 108 (1965). The evidence
8 may be based upon a confidential informant’s tip, so long as the issuing judge is reasonably assured
9 that the confidential informant was credible and the information was reliable. *Id.*

10 Probable cause exists when, under the totality of the circumstances, “there is a fair
11 probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v.*
12 *Gates*, 462 U.S. 213, 238 (1983). In reviewing the validity of a search warrant, a court is limited
13 to the information and circumstances contained within the four corners of the underlying affidavit.
14 *United States v. Stanert*, 762 F.2d 775, 778 (9th Cir. 1985). A magistrate judge’s issuance of a
15 warrant is reviewed for “clear error,” and the warrant should be upheld as long as the magistrate
16 judge had a “substantial basis for concluding that probable cause existed based on the totality of the
17 circumstances.” *United States v. Leon*, 468 U.S. 897, 914 (1984); *United States v. Mendonsa*, 989
18 F.2d 366, 368 (9th Cir. 1993). The task for the issuing magistrate or judge is “simply to make a
19 practical, common sense decision whether, given all the circumstances set forth in the affidavit
20 before him, there is a fair probability that contraband or evidence of a crime will be found in a
21 particular place.” *Gates*, 462 U.S. at 238.

22 This reviewing court is charged with making sure that the magistrate judge had a
23 “substantial basis for” concluding that probable cause existed. *Gates*, 462 U.S. at 244-45. Looking
24 at the affidavit and totality of the circumstances, the court finds there were enough facts contained
25 in the affidavit that supported the magistrate judge’s finding of probable cause for the warrant.¹

27 ¹There were other facts presented in the affidavit that at the hearing were shown to be
28 superfluous. For example, the affidavit stated that the package was routed from Fife, Washington
on a circuitous route headed to Guam. At the hearing, however, testimony was presented that what

1 Officer Desamito received an anonymous tip that drugs would be sent to Guam. The tip included
2 where the drugs were coming from, where they were to be sent, as well as a DHL tracking number.
3 The Officers actually met the informant who provided the name of the Defendant as the intended
4 recipient of the package. The Officers learned that the DHL package matching the DHL tracking
5 number given by the informant had arrived on Guam. A background check of the Defendant
6 revealed that he had an outstanding warrant in Washington and was on probation for local charges.
7 An X-Ray of the package revealed that the package contained an organic substance consistent with
8 the importation of drugs or controlled substance.²

9 Additionally, the informant in this case made himself³ known to the Officers, and the
10 Officers met the informant in person. An in person encounter significantly bolsters reliability
11 because officers "may perceive and evaluate personally an informant's mannerisms, expressions,
12 and tone of voice" and because the informant knows that he may be tracked down and held
13 accountable for false assertions. *United States v. Romain*, 393 F.3d 63 (1st Cir. 2004).

14 Courts look to several factors to determine the reliability of an informant's tip. First,
15 a known informant's tip is thought to be more reliable than an anonymous
16 informant's tip. That is because an anonymous informant typically cannot be
17 questioned about the basis for knowing the information or motive for providing the
18 tip, nor can the anonymous informant be held accountable for providing false
19 information in violation of the law. Second, an informant with a proven track record
20 of reliability is considered more reliable than an unproven informant. Third, the
informant's tip is considered more reliable if the informant reveals the basis of
knowledge of the tip--how the informant came to know the information. Finally, a
tip that provides detailed predictive information about future events that is
corroborated by police observation may be considered reliable, even if the tip comes
from an anonymous source. Predictive information that reveals a detailed knowledge

21 route the package would be mailed were events beyond the Defendant's control. In other words,
22 there was nothing suspicious about this event. In addition, there was a statement in the affidavit that
23 the informant had told the Officers that the Defendant had received a prior package of "ice." Again,
this fact was not corroborated. However, even disregarding these statements, there was still enough
24 stated in the affidavit to establish probable cause.

25 ²On page 6 of the affidavit Officer Desamito added a written notation that "[t]he CET
determined the contents were organic in nature and through their training and experience consistent
26 with contraband." This notation was added after the Magistrate Judge questioned the Officer
regarding what was suspicious about the package.

27 ³The gender of the informant was never revealed, however, for purposes of this order the
informant will be referred to in the masculine pronoun.

1 of an individual's intimate affairs is more reliable than predictive information that
2 could be observed by the general public, and such self-verifying detail is
3 considerably more valuable if it relates to suspicious activities than if it relates to
innocent activities.

4 *United States v. Rowland*, 464 F.3d 899, 907-908 (9th Cir. 2006) (citations omitted).

5 The informant in this case gave a description of the Defendant, predicted that the Defendant
6 would receive a package shipped by DHL, accurately stated that the package was coming from Fife,
7 Washington, and provided the correct DHL routing number. The Officers were able to corroborate
8 the informant's tip by contacting the DHL Office to verify that a package with the DHL routing
9 number existed and was on its way to Guam. The informant provided sufficient detail to dispel
concerns that the tip was a hoax.

10 Although the drug detector dog failed to alert to the drugs in the package, masking the odor
11 of drugs is a common technique used by drug couriers. See *United States v. Brown*, 33 F.3d 1014
12 (8th Cir. 1994) (United Parcel Service employee searched teddy bear for illegal drugs because it was
13 wrapped in fabric softner sheets); *U.S. v. Urrea-Leal*, 322 F.Supp.2d 1213, 1215 (D.Kan., 2004)
14 (Trooper Morris has been involved in more than 50 interdiction stops in which drugs were seized;
15 30 to 35 of these were marijuana seizures. Training and experience has taught him that transporters
16 of drugs often attempt to mask or cover up the odor of drugs with other odors); *United States v.
17 Koenig*, 856 F.2d 843, 845 (7th Cir. 1988) (Federal Express employee investigated package smelling
18 of laundry soap or fabric softner because of his knowledge of the use of these products to mask the
19 smell of cocaine).

20 The court finds the combination of the verified information provided by the informant and
21 the Controlled Enforcement Team's belief that the package contained a substance organic in nature
22 that was believed to be consistent with contraband provided a substantial basis for the magistrate
23 judge to issue the warrant. Under the totality of the circumstances, the magistrate judge made a
24 sensible decision that a reasonable probability existed that contraband would be found within the
25 DHL package. The magistrate judge's issuance of the warrant in this instance, was not "clear error."
26 *United States v. Leon*, 468 U.S. 897, 914 (1984). "In the absence of an allegation that the magistrate
27 abandoned his detached and neutral role, suppression is appropriate only if the officers were
28

1 dishonest or reckless in preparing their affidavit or could not have harbored an objectively
2 reasonable belief in the existence of probable cause." *Leon*, 468 U.S. at 926. In this case there is no
3 basis for such a determination.

4 **III. CONCLUSION**

5 Based upon the foregoing, the court finds there was a substantial basis for the magistrate
6 judge to issue the search warrant.⁴ Accordingly, the Court **DENIES** the Defendant's motion.⁵

7 **IT IS SO ORDERED.**



8
9 /s/ Frances M. Tydingco-Gatewood
10 Chief Judge
11 Dated: Mar 23, 2007
12
13
14
15

16 ⁴The thorough scrutiny of Officer Desamito's affidavit in this case serves as a reminder to
17 law enforcement officers who draft affidavits in their efforts to secure search warrants that they must
18 strive to write clear and concise affidavits that provide sufficient information for a reviewing
19 magistrate judge to determine if probable cause exists to justify a search. In many cases, as in this
20 one, the affidavit will be a key piece of evidence in evaluating the issuing judge's probable cause
determination. Taking the time to carefully draft an affidavit that fully sets out the basis for
"probable cause" can often spare courts and parties the necessity of conducting mini-trials on the
issue of "probable cause."

21 In this instance, the affidavit clearly could have been bolstered by including facts known by
22 Officer Joseph Gange. For example, that based on his years of training and experience the contents
23 of the package were packed in a manner consistent with drug packaging; the X-ray of the contents
revealed organic material as organic matters will show up white in color in the X-ray. And, that
when tipping the package, there appeared to be crystalline substances contained therein consistent
24 with methamphetamine. The saving of a warrant should not rest upon the written notation of an
officer who at the request of the magistrate judge is having to provide further explanation in support
25 of the warrant.

26 ⁵Although the Defendant's motion sought the suppression of all the physical evidence and
27 the fruits thereof, along with any other physical evidence and statements, derived from the search
of the DHL package executed on December 31, 2006, there was no evidence presented concerning
28 any other physical evidence other than the DHL package or evidence of any statements made.

NOT FOR PUBLICATION

MAY 06 2008

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

RECEIVED

UNITED STATES OF AMERICA,

No. 07-10352

Plaintiff - Appellee,

MAY 12 2008
M. Brille
FEDERAL
PUBLIC DEFENDER

v.

D.C. No. CR-07-00025-FMT

RYAN JASON WALL,

MEMORANDUM*

Defendant - Appellant.

Appeal from the United States District Court
for the District of Guam
Francis Tydingco-Gatewood, District Judge, Presiding

Argued and Submitted April 15, 2008
San Francisco, California

Before: FERGUSON, Trott, and THOMAS, Circuit Judges.

Ryan Jason Wall appeals the district court's denial of his motion to suppress.

Wall moved to suppress methamphetamine found in a DHL parcel which had been intercepted by the Guam Drug Enforcement Agency, on the ground that the affidavit supporting the application for the search warrant was not supported by

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.



probable cause. The district court denied the motion, and Wall entered a conditional plea of guilty to conspiracy to distribute methamphetamine and attempted possession of methamphetamine with intent to distribute.

We hold that the information in the affidavit is insufficient to support a finding of probable cause and thus reverse. However, we remand for the district court's consideration in the first instance of whether the seizure was authorized under 5 Guam Code Ann. § 73102(2) or under the good faith exception to the warrant requirement. Because the parties are familiar with the factual and procedural history of this case, we will not recount it here.

I

Probable cause exists when “given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.” Illinois v. Gates, 462 U.S. 213, 238-39 (1983). We review the issuance of a search warrant by a magistrate judge for clear error, to determine whether the magistrate had a “substantial basis for concluding that probable cause existed.” Id. at 239 (internal quotation marks and alteration omitted). Like the district court, we are “limited to the information and circumstances contained within the four corners of the underlying affidavit.”

United States v. Stanert, 762 F.2d 775, 778 (9th Cir. 1985), amended on other grounds, 769 F.2d 1410 (9th Cir. 1985). The affidavit supporting the warrant application contained two sources of information to establish probable cause: a confidential informant, and conclusions drawn by customs officers after x-raying the package. Under the circumstances, this information is insufficient to sustain a finding of probable cause.

A

To determine whether an informant's tip is sufficient to support a finding of probable cause, a court must use a "totality-of-the-circumstances approach" that takes into consideration the informant's "veracity" or "reliability" and his "basis of knowledge." Gates, 462 U.S. at 238. We have identified several factors to which a court should look to determine the reliability of an informant's tip. See United States v. Rowland, 464 F.3d 899, 907-08 (9th Cir. 2006). These factors include: whether the informant is known or anonymous, whether the informant has a proven track record of reliability, the informant's basis of knowledge, and whether the informant "provides detailed predictive information about future events that is corroborated by police observation." Id.

Weighing all of the factors, under a totality of the circumstances analysis, we conclude that the confidential informant's tip should have been given little

weight. Although the confidential informant met in person with a Drug Enforcement Agency (DEA) agent, the informant had no track record of reliability, did not reveal her/his¹ basis of knowledge, and did not provide any predictive information about future events. DEA agents verified only “innocent” information, which was just as consistent with legal activity as it was with the illegal activity the informant alleged. “[M]ere confirmation of innocent static details is insufficient to support an anonymous tip.” United States v. Mendonsa, 989 F.2d 366, 369 (9th Cir. 1993).

B

The only additional information in the affidavit that could support a finding of probable cause is the handwritten notation that agents “determined the contents were organic in nature and through their training and experience consistant [sic] with contraband.” The affidavit does not explain the meaning of the term “organic in nature,” nor does it offer any explanation as to what made the contents consistent with contraband. Indeed, the tip indicated that the package would contain methamphetamine, a synthetic compound—not an organic product. Therefore, the fact that the package contained organic product detracted, rather than added, to the indicia of contraband.

¹ The gender of the confidential informant was never revealed.

Such unsubstantiated conclusions are insufficient to establish probable cause. See, e.g., United States v. Clark, 31 F.3d 831, 834-35 (9th Cir. 1994) (finding no probable cause based on an anonymous tip that Clark was growing marijuana, coupled with a detailed account of Clark's monthly electrical consumption and the conclusory statements that the electricity use was unusually high and that marijuana cultivators often consume excessive quantities of electricity to provide light and heat to the plants).

Because an uncorroborated tip, coupled with an unsupported conclusion that the contents of a package are "consistent with contraband," does not establish "a fair probability that contraband or evidence of a crime will be found in a particular place," Gates, 462 U.S. at 239, the supporting affidavit did not provide a "substantial basis for concluding that probable cause existed," id., and the magistrate judge erred in issuing the search warrant.

II

The government argues that the seizure was valid because Guam Customs Officers were statutorily authorized, under 5 Guam Code Ann. § 73102(2) ("the Guam Statute"), to seize the contents of the DHL package. We recently held, in Rowland, that "Guam Customs officers are statutorily authorized [under the Guam Statute] to arrest persons and seize methamphetamine 'imported into Guam,'" 464

F.3d at 904, and that contraband brought into Guam from another part of the United States is “imported into Guam” for the purposes of the Guam Statute, *id.* at 907. In denying Wall’s motion to suppress, the district court did not address the Guam Statute because it based its decision on other grounds. Both parties presented arguments to us as to the application of the Guam Statute under the circumstances presented by this case. However, the record is not sufficiently developed for us to make that determination as a matter of law, and we would prefer to review that issue on the basis of a fully developed record, coupled with the district court’s analysis of the issue.

III

The district court appeared to conclude that the seizure was justified under the good faith exception to the warrant requirement described in United States v. Leon, 468 U.S. 897 (1984). The government did not raise this defense either before the district court or before us,² and the district court order does not appear to

² The government did cite Leon to the district court, but only in the context of making an anticipatory argument that a Franks hearing on the question of whether the warrant was procured by intentional or reckless misrepresentations was not required. See Franks v. Delaware, 438 U.S. 154, 155-56 (1978). However, Wall did not request a Franks hearing.

contain specific factual findings that would underlie the conclusion that the Leon good faith exception would apply.³

At oral argument, both parties indicated that if the Leon good faith exception were at issue, they would prefer to develop the factual record and present arguments to the district court in the first instance. Therefore, we conclude that a remand is required to allow the parties to present evidence and arguments on this question, and to allow the district court to make findings and conclusions based on a fully-developed record.

IV

For these reasons, we vacate the order of the district court and remand the case to the district court for its consideration in the first instance based on a full record of the applicability of the Guam Statute and the Leon good faith exception to the warrant requirement.

VACATED and REMANDED.

³ Given the district court's conclusion, however, we do not consider the issue waived by the government.